73-214

OCT 2 1974

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

CASPAR WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE; UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE; FERNANDO E.C. DeBACA, DIRECTOR OF REGION NINE OF UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE; JOHN F. RICHARDSON, COMMISSIONER OF REGION NINE OF THE SOCIAL SECURITY ADMINISTRATION; SOCIAL SECURITY ADMINISTRATION,

Appellants,

v.

CONCETTA SALFI and DOREEN A. KALNINS,

Appellees.

On Appeal From The United States District Court
For The Northern District Of California

MOTION TO AFFIRM AND/OR DISMISS

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STATEMENT OF FACTS

As Appellants'[1] Jurisdictional Statement notes, the facts are not in dispute. Appellees[2] can therefore adopt SSA's statement of facts, except for one highly misleading implication. SSA alleges that the District Court took no action with respect to the class until it granted the Salfi family's motion for summary judgment,[3] and, again, that the District Court "deferred" action on the class until it decided the merits.[4] A more accurate description would be that the District Court certified the class immediately after its earliest hearing in the case, which -- because of SSA's litigation strategy -- happened to be the hearing on the merits.

Due to various delays in scheduling the sitting of the three-judge panel, the Salfi family's motion for preliminary injunction could not be heard until after SSA's answer was due. In lieu of answering, SSA stipulated to the allegations of the Complaint, including the (b)(2) class action allegations. In the same stipulation the parties waived time limitations so that cross-motions for summary judgment and a motion to dismiss could be heard with the motion for preliminary injunction. It was further agreed that this combined hearing would constitute the trial on all issues. Thus the certification hearing was implicit in the combined motions hearing and trial although neither party

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[1] Appellants consist of various officials of the Social Security Administration (SSA) and of the Department of Health, Education and Welfare of which SSA is a sub-agency. Hereinafter appellants will jointly be denominated SSA.

[2] Appellees consist of Mrs. Concetta Salfi and her daughter Dorothy A. Kalnins, respectively the widow and step-child of the deceased wage earner, Londo L. Salfi. Hereinafter appellees will jointly be denominated the Salfi family.

[3] Jurisdictional Statement, p. 5.

[4] Jurisdictional Statement, p. 14, n.10.

ever addressed the class issue. Thereafter the court certified the class as part of the order in which it disposed of all of the issues in the case. A class action issue was first explicitly raised approximately six weeks later when SSA objected to a provision of the order and final judgment which it viewed as requiring it to bear the cost of Eisen-type notice.[5/] Neither then nor in this Court has SSA ever objected to the appropriateness of a class action, definition of the class, representative nature of the parties' plaintiff or any other issue which is normally contemplated in a certification hearing.

5/ As will be discussed in some detail infra, the court never ordered Eisen-type notice of the pendency of the action since this is a Rule 23(b)(2) action rather than a (b)(3) action as to which Rule 23(c)(2), of which Eisen is an interpretation, requires such pre-judgment notice. The notice to which SSA objects is not a Rule 23 notice at all, but rather a notice to those previously denied benefits on the grounds of the invalidated provisions that they may reapply to SSA and will receive benefits if found otherwise eligible. Such notice, of course, is regularly required in equitable decrees where necessary to correct the effects of previous erroneous conduct by the defendants. See e.g., United States v. Jefferson County Board of Education, 380 F.2d 385, 391 (5 Cir. 1967) requiring notice to Black students that they may enter previously all White schools pursuant to court ordered desistance from segregated schooling.

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SUMMARY OF ARGUMENT

Constitutional Issue. The statutory provisions invalidated below substituted a conclusive presumption for appellees' right to prove the salient facts establishing their eligibility. Conclusive presumptions violate the Fifth Amendment unless they are of a matter that is invariably true. The conclusive presumption invalidated below is neither of a matter which is invariably true, nor of a matter which is impossible (or even difficult) of determination through Social Security Administration factual investigation. Cases limiting the scope of the equal protection doctrine in the social welfare area have no application to the conclusive presumption doctrine which is based upon requirements of procedural due process and not upon equality.

Sovereign Immunity. Appellants' argument that appellees have erroneously proceeded under a statute which does not waive sovereign immunity rather than under another available statute which does should be dismissed as not meriting the attention of this Court. The government suffered no harm from this asserted error which is de minimus and a decision for appellants on this ground would be devoid of any practical effect -- virtually an advisory opinion.

If sovereign immunity be deemed to bar the judgment below, the Court should allow full briefing and argument on the question of whether it ought to repudiate the doctrine of sovereign immunity which, in the unanimous views of legal scholars and the legal profession in general, is an anachronistic injustice which serves no purpose in modern law.

Even without repudiating the doctrine of sovereign immunity, the judgment below may be upheld on any of the following grounds: (a) that it is not against the United States because it requires only that federal officers administer the Social Security program in consonance with the federal Constitution; (b) that it is not

against the United States because no damages or benefits are directly involved, for it only requires that applications originally disallowed on an unconstitutional basis be re-examined; (c) that it is not barred by sovereign immunity insofar as it would result only in effectuation of Social Security Administration regulations governing payment of back paymehts where applications were originally erroneously denied; (d) that it is not against the United States because all expenditures would come out of the extant Social Security Trust Fund; (e) that sovereign immunity as to suits for Social Security benefits has been waived by 42 U.S.C. § 405(g) upon which the decree implicitly rests -- and/or that this waiver allows identical relief under other sources of jurisdiction upon which the judgment rests; (f) that 28 U.S.C. 1343, 1361, and the Administrative Procedure Act constitute waivers of sovereign immunity; and (g) that sovereign immunity does not bar suits the jurisdiction and cause of action as to which arise directly out of the Fifth Amendment.

Class Action. Appellants were not ordered to provide pre-judgment notice of the pendency of the action, but post-judgment notices of their right to reapply to all those previously denied benefits. Such notice does not relate to the requirements of Rule 23, but rather is of the kind commonly decreed where necessary to correct previous wide-spread wrongful or erroneous conduct of a defendant. Even if the notice to which appellants object were a prejudgment Rule 23(c)(2) notice of pendency of action, appellants would properly be required to pay for it since as losing parties they are responsible for the costs. Since this lawsuit was one brought predominantly for injunctive or declaratory relief, it proceeded under Rule 23(b)(2) as to which a pre-judgment notice of pendency of action is not required, rather than upon (b)(3), relating to damage actions, as to which such notice is required. Rule 23, as presently constituted, does not violate due process. As SSA stipulated to the (b)(2) nature of the lawsuit and actively helped to chart the course of litigation below, without voicing any objection on class action grounds, it has waived the making of any such objection.

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ARGUMENT

The Salfi family respectfully urges this Court to affirm the judgment below in all respects. The Salfis further respectfully urge this Court to dismiss the sovereign immunity and class action issues raised by SSA as inappropriate for decision under the facts of this case.

CONSTITUTIONAL ARGUMENT

The Salfi family urges that the Social Security provisions invalidated below create an unconstitutional conclusive presumption that a marriage was entered into in contemplation of a wage earner's death if he dies within the nine months thereafter. SSA, admitting the invalidated provisions to be a conclusive presumption,[1/] attacks the judgment below for ignoring the principles this Court has laid down to govern equal protection challenges to social welfare legislation. This objection is inappropriate since the principles and rationale governing conclusive presumption cases are entirely different from those applicable to equal protection cases.[2/] This Court recognized the repugnance of conclusive presumptions to Fourteenth Amendment procedural due process[3/] some forty years before it held that Fifth Amendment substantive due process might encompass the concept of equal protection which is specifically delineated in the Fourteenth Amendment.[4/] The gravamen of the conclusive presumption doctrine is not inequality, but deprivation of the individual's right to prove his claim by the substitution of a conclusive presumption for that right. As this Court said just last Term, in striking down a presumption that only those who had resided in the state

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1/ The provisions are not specifically phrased as conclusive presumptions. But this Court has identified statutes as conclusive presumptions where the statutory intent was clearly to create an evidentiary rather than substantive rule, and/or where no substantive purpose for the statute could be determined. E.g., Stanley v. Illinois, 405 U.S. 645 (striking down as conclusive presumption statute excluding unmarried fathers from the definition "parents", just as the Salfi family are excluded from the statutory definitions of "widow" and "child"), Department of Agriculture v. Murry, 413 U.S. 508 (striking down as a conclusive presumption exclusion from Food Stamp eligibility of any person claimed as a tax dependent by his parent in the preceding year), Vlandis v. Kline, 412 U.S. 441 (striking down as a conclusive presumption a duration-of-residency requirement for those hoping to escape non-resident college tuition fees), Dunn v. Blumstein, 405 U.S. 330 (striking down a duration requirement for voting as a conclusive presumption that putative voters not meeting it were not bona fide residents).

Following this analysis, appellees would first note that Congress itself has twice described the provisions invalidated below as evidentiary in character, being intended to weed out marriages which were "undertaken to secure benefit rights" as opposed to bona fide marriages. House Report No. 92-231, 96 Cong., 2d Sess. (1972) (quoted in the opinion below at p.5A of the Jurisdictional Statement) and the Report of the Senate Finance Committee which accompanied the passage of the challenged provisions in 1968. See 1967 U.S. Cong. News and Admin. Rep., V.2, p. 2953. Secondly, on this appeal, SSA does not suggest any substantive, non-evidentiary purpose which the challenged provisions might have been intended to effect. (In the court below SSA suggested that the challenged provisions were intended to exclude marriages in which the wife and step-child had not been economically dependent upon the wage earner, rather than marriages

1/(Cont'd.) entered into fraudulently. This suggestion contravened both the legislative purpose and various other provisions of the Social Security Act. More important, far from proposing a substantive purpose in order to show that these provisions were not a conclusive presumption, this suggestion merely redefined them as conclusively presuming a different set of evidentiary facts. And a nine-month post-marital conclusive presumption of economic dependency is not invariably -- or even in the majority of cases -- true, as is demonstrated in greater detail in the Salfi family's memorandum of points and authorities in support of motion for summary judgment in the court below. That court did not even deign to mention SSA's alternative explanation of the conclusive presumption and SSA has not raised it again here.)

2/ The Salfi family did offer an equal protection argument, but only in the sense of Stanley v. Illinois, 405 U.S. 645, i.e., that a conclusive presumption is so arbitrary and unreasonable as to be per se an unjustifiable invidious discrimination against those persons affected by it viz a vis those not so affected.

3/ See e.g., Schlesinger v. Wisconsin, 270 U.S. 230, 240, citing Mobile, J. & K. C. Ry. v. Turnipseed, 219 U.S. 35, 44 ("If a legislative provision not unreasonable in itself, prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him.")

4/ Bolling v. Sharpe, 347 U.S. 497 (1954).

for a year were bona fide residents for state college tuition purposes:

> "[Connecticut is forbidden to make] a permanent and irrebuttable presumption of non-residence, when that presumption is not necessarily or universally true in fact, and when the state has reasonable alternative means of making the crucial determination. Rather, standards of due process require that the state allow such an individual the opportunity to present evidence showing that he is a bona fide resident entitled to the in-state rates. Since § 126 [the Connecticut statute involved] precluded the appellees from ever rebutting the presumption that they were non-residents of Connecticut, that statute operated to deprive them of a significant amount of their money without due process of law."

Vlandis v. Kline, 412 U.S. 441, 452 (emphasis added).

The arbitrariness and inaccuracy of the conclusive presumption challenged by the Salfi family is illustrated by its effect upon them. SSA stipulated below to the following facts concerning the marriage and death of Mr. Salfi:

> "that Mr. Salfi's death from heart failure was entirely unexpected and unforseen; that Mr. Salfi was in sound health both at the time of the marriage and in the more than 12 months previous thereto during which they courted; that Mr. Salfi was an active and, to all appearances, perfectly healthy man of 52 years at the time of the marriage; that routine medical examinations over the past several years showed Mr. Salfi to be in good health with an expectancy (actuarily determined) of another 21 years of life; that plaintiff [Mrs. Salfi] and Mr. Salfi were married not in contemplation of his death, but because of their mutual love and need for each other and with the expectation of living the remaining years of their lives together."[5/]

Nevertheless, the challenged provisions substitute for the opportunity to prove these facts a conclusive presumption that the marriage was somehow entered into fraudulently for the purpose of qualifying the Salfi family for benefits after Mr. Salfi's anticipated early death. Of course some of the applications for benefits excluded by such a presumption will be from persons who married fraudulently in the expectation of their spouse's death.[6/] But the arbitrariness of that presumption is demonstrated by the fact that on the same grounds it excludes applications from legitimately married persons whose spouses died within nine months and fails to exclude the fraudulently married where the spouse died after nine months. Thus this conclusive presumption is fully as irrational as a conclusive presumption excluding persons from the definition of residents of a state because they have not maintained a legal address there for at least a year before

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[5/] Complaint, paragraph 11.

[6/] It should be noted that SSA failed to introduce any evidence that any fraudulent marriage for this purpose has ever occurred or to refer to any hearings or testimony upon which Congress might have based conclusions as to the incidence of such marriages. Similarly, SSA neglected to even attempt to validate the presumption by showing that more fraudulent marriage applications would be excluded than applications from legitimately married applicants; or showing how many fraudulent marriages are not excluded by the presumption because the expected death of the spouse occurs more than nine months after marriage.

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entering college (Vlandis v. Kline, supra), or that persons who had been supported by others in the preceding year were still receiving private charity so as to disqualify them for Food Stamps (Department of Agriculture v. Murry, supra), or that a gift given within two years of the donor's death was given in expectation thereof (Heiner v. Donnan, 285 U.S. 312 (1932)), or that involvement in an auto accident demonstrates recoverable negligence (Bell v. Burson, 402 U.S. 535 (1971)).

In this Court SSA justifies the provisions invalidated below as avoiding "the expense and administrative burden which would be required by subjective inquiry on a case-by-case basis."[7/] But where the right of citizens to prove their claim is involved, it is precisely such a hearing which is required. As Mr. Justice Stewart said, speaking for this Court in Vlandis v. Kline, supra: "The state's interest in administrative ease and certainty cannot, in and of itself, save the conclusive presumption from invalidity under the Due Process Clause where there are other reasonable and practicable means of establishing the pertinent facts on which the state's objective is premised." 412 U.S. at 451. Such alternative means are abundantly available here.[8/] Since people generally do not anticipate imminent death except upon medical advice, SSA could easily determine whether the marriage was entered into in expectation of imminent death by merely consulting the deceased's physician. Indeed it could relieve itself of even that administrative burden by imposing a rebuttable presumption

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[7/] Jurisdictional Statement, p.8.

[8/] Indeed Congress could not have thought such a determination impossible to make since, in a slightly different context, it has imposed an affirmative duty upon SSA to make exactly that determination. Where a wage earner dies accidently, or in the course of military service, Title 42 U.S.C. § 416(k) requires SSA to give survivors' benefits unless it "determines that at the time of the marriage involved, the individual could not have reasonably been expected to live for nine months ...."

as a result of which, in situations where death occurred within nine months after marriage, the applicant would have to submit evidence from the physician and/or other sources that the wage earner had not married in expectation of death.

Finally, SSA to the contrary notwithstanding, the conclusive presumption doctrine does not turn upon -- indeed it has nothing to do with -- the issue of whether a "fundamental" or specially protected interest is involved in this case. As Murry, Vlandis and Heiner demonstrate, the right to procedural due process applies to all statutory provisions including those concerned with gratuity programs, tax exemptions and education benefits.

SOVEREIGN IMMUNITY

I. SOVEREIGN IMMUNITY DOCTRINE WAS INAPPLICABLE SINCE THE SUIT WAS AGAINST FEDERAL OFFICERS TO ENJOIN AND REDRESS UNCONSTITUTIONAL ACTIONS.

SSA apparently concedes that sovereign immunity does not bar the judgment below insofar as it merely declares the challenged provisions unconstitutional or even enjoins their future enforcement.[9/] But SSA relies upon an ambiguous footnote in Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, n.11, which says that relief even against an unconstitutional statute "may" be unavailable if it would require affirmative action or operate against the United States Treasury. This language, which has never been clarified by this Court, has been interpreted by the commentators to mean that sovereign immunity bars constitu-

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[9/] No objection is made to the declaratory relief afforded below and the Jurisdictional Statement flatly admits at p.10, "that sovereign immunity does not bar suit where the officer is acting pursuant to an unconstitutional statute. Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682 ..." The Questions Presented (p.2) and most of the Jurisdictional Statement object to the lawsuit only "insofar as it seeks retroactive Social Security benefits." On the other hand, p. 12, n.7 of the Jurisdictional Statement appears to question the propriety of the prospective injunctive relief as well.

tional litigation only where the relief sought was so sweeping as to impair the credit or otherwise gravely impede the operation of the federal government.[10] Under this view, the lower court held sovereign immunity inapplicable since the relief sought is identical or substantially similar to that approved by this Court in Morton v. Ruiz, 415 U.S. 199 (1974) (upholding class action to mandate re-examination of applications for federal Indian welfare benefits which had previously been denied due to an invalid administrative regulation), Griffin v. Richardson, 346 F.Supp. 1226, aff'd 409 U.S. 1069 (declaring unconstitutional provisions of the Social Security Act and ordering retroactive benefits to the class), Department of Agriculture v. Murry, supra (declaring statutory restriction on Food Stamp eligibility unconstitutional and mandating payment of benefits to class), and Department of Agriculture v. Moreno, 413 U.S. 528 (1973) (same).

Moreover, even if Larson be read as barring this litigation, it would not be conclusive since this Court granted relief identical or substantially similar to that obtained below in Morton, Griffin, Murry and Moreno, supra, all decided after Larson, as well as in earlier cases.[11] (This Court has several times recognized that its sovereign immunity decisions

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10/ Jaffe, Judicial Control of Administrative Action, 226-227; Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1, 34 (1963). State of Washington v. Udall, 417 F.2d 1310,1318 (1969); Turner v. Kings River Conservation District, 360 F.2d 184, 190 (1966). See also Littell v. Morton, 445 F.2d 1207, 1212-1214 (4 Cir. 1971).

11/ Cf. Miguel v. McCarl, 291 U.S. 442, 455 (1934) (mandating payment of retirement or pension benefits illegally withheld), State of Ohio v. Helvering, 292 U.S. 360 (1934) (entertaining, although deciding adversely, state suit to enjoin collection of taxes of the United States -- Kansas v. United States, 204 U.S. 33, holds that federal sovereign immunity applies to suits by states) Higbee Co. v. Willis v. Fentress, 297 U.S. 110 (1936) (enjoining collection of unconstitutional federal tax). See also Roberts v. United States ex rel Valentine, 176 U.S. 221 (1900).

are not easily reconciled,[12] while the leading commentator has said that, "inconsistencies in Supreme Court holdings on sovereign immunity in suits against officers are so flagrant as to make many decisions seem almost capricious.")[13]

SSA seeks to base its sovereign immunity argument upon Edelman v. Jordan, ___ U.S. ___ (1974), a case which does not even mention, much less try to reconcile, Larson and the other cases cited heretofore. Edelman is based upon the Eleventh Amendment, which, although sometimes compared to sovereign immunity, is a far more difficult obstacle to federal jurisdiction. The judiciary having solely created the doctrine of federal sovereign immunity, has unfettered authority to limit, abrogate or abolish it.[14] The Eleventh Amendment, which embodies a "constitutional" right"[15] is not subject to judicial abrogation; indeed it represents a national repudiation of a decision of this Court.[16] The central purpose of the Eleventh Amendment's prohibition of federal judicial jurisdiction over states -- outraged federalism -- is simply inapplicable where federal jurisdiction

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12/ See e.g., Brooks v. Dewar, 313 U.S. 354 (1941) and Malone v. Bowdoin, 369 U.S. 643, 646 (1962).

13/ Davis, Administrative Law Treatise, 546.

14/ Block, "Suits Against Government Officers," 59 Harv. L. Rev. 1060, 1081 (1946) "[Confining sovereign immunity to cases] where no substantial claim is made that the officer is acting pursuant to an unconstitutional enactment, or in excess of his statutory authority ... can be accomplished by the courts without the necessity of legislative action. In suits against government officers, the courts have always decided for themselves the question of how and to what extent the doctrine should be applied." The author distinguishes the issue of state government liability which has already been adversely determined by the Eleventh Amendment.

15/ Edelman v. Jordan, supra, U.S. at (1974).

16/ Chisolm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) which held that states could be sued by citizens of other states in the federal courts. See analysis in Edelman, supra, U.S. at

is asserted over federal officials.[17] The difference between the Eleventh Amendment and federal sovereign immunity lies essentially in the burden of proof. In Edelman the burden lay upon the citizen to show why a judicially created illogical and fictional distinction between the state officer and the state itself[18] should be expanded in derogation of a specific constitutional command. In this case, however, the burden is upon SSA to show why citizens unconstitutionally deprived of benefits should be denied a judicial forum according to an exception-riddled doctrine for which no one has ever produced a credible, coherent, comprehensive justification[19] and which is based upon more than a score of irreconcilable cases."

17/ On the contrary, as this Court has stated (adopting the language of the lower court): "'We yet like to believe that wherever the Federal Courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum.'" McNeese v. Board of Education, 373 U.S. 668, 674, n.6 (1963). That reasoning is even more imperative where, as here, the absence of any alternative state jurisdiction means that denial of federal jurisdiction will preclude any judicial protection whatever for the Salfi family's constitutional rights.

18/ Ex parte Young, 209 U.S. 123 (1908). The fictionality of the distinction is frankly admitted by Prof. Davis, 3 Administrative Law Treatise, 545:

> "A plaintiff who wants to compel or to enjoin governmental action often escapes the doctrine of sovereign immunity by suing an officer. The courts are accustomed to indulging in the false pretense that such a suit is not against the government, even though all concerned are fully aware that it is. Confusion often develops because the courts sometimes look to the reality and sometimes look to the pretense. As long as the doctrine of sovereign immunity continues to prevent suits which are really against the government to be brought against the government, what is needed is consistent adherence to the false pretense and rejection of the truth."

19/ Prof. Davis, ibid, at 546-547, refers to "the almost unbelievable lack of specific judicial inquiry into reasons for the basic doctrine"; "the astonishing legal phenomenon that the doctrine of sovereign immunity came into American law without a judicial discussion of its merits and demerits, and [that] recent Supreme Court opinions are characteristically lacking in perspective of the doctrine's overall consequences." --which he (along with quite literally every other commentator) regards as unequivocally pernicious.

II. IF SOVEREIGN IMMUNITY BARS SUITS TO REDRESS THE ENFORCEMENT OF UNCONSTITUTIONAL LAWS THIS COURT SHOULD HEAR ARGUMENT AS TO THE POSSIBILITY OF ABANDONING THE SOVEREIGN IMMUNITY DOCTRINE.

As this brief will in any case be almost burdensomely long, treatment of the numerous sovereign immurity issues has been truncated to little more than outline form. If after reading it, the Court does not find this argumentation sufficient to uphold the judgment below, appellees would most earnestly entreat it not to summarily reverse, but rather to set the matter for full briefing and argument, including possible amici briefs from the various organizations, like the American Bar Association,[20] which have called for the abolition of sovereign immunity. Appellees respectfully urge that if this Court embraces a doctrine which has been unanimously rejected by legal scholars and the profession in general for over fifty years ("No scholar, so far as can be ascertained, has had a good word for sovereign immunity for many years;"[21] "Nearly every commentator who considers the subject vigorously asserts that the doctrine of sovereign immunity must go."[22]) it should at least do so in a comprehensive and fully

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20/ Davis, 1970 Supp. Volume at p. 895, states that the ABA House of Delegates in 1970 adopted in principle a proposal of its Administrative Law Section to eliminate legislatively nearly all vestiges of the doctrine and that the ABA is currently sponsoring such a measure in Congress.

21/ Crampton, "Non-statutory Review of Federal Administrative Action," 68 Mich. L. Rev. 387, 419 (1970). Among the authorities quoted by Professor Crampton is Professor Walter Gellhorn: "Today the doctrine may be satisfactory to technicians but not at all to persons whose main concern is with justice ... The trouble with the sovereign immunity doctrine is that it interferes with consideration of practical matters, and transforms everything into a play on words.", while Milton Carrow is quoted to the effect that the "doctrine of sovereign immunity has long fulfilled the requirements for 'full abandonment.'"

22/ Davis, supra, at 435.

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considered opinion.[23] Such a fully considered opinion would give the Court the opportunity once and for all to lay to rest the familiar assertion that sovereign immunity has no rhyme or reason; that: "The strongest support for sovereign immunity is provided by that four-horse team so often encountered - historical accident, habit, a natural tendency to favor the familiar, and inertia. Nothing else supports sovereign immunity ..."[24] Surely this Court ought not to re-assert that doctrine in a per curiam summary reversal based upon previous cases which the Court itself has characterized as confusing and irreconcilable and which have, in sum, provoked normally unemotional scholars to outraged epithets

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[23] Such a fully considered opinion would negate criticisms such as that of Prof. Scalia, "Sovereign Immunity and Non-Statutory Review of Federal Administrative Action," 68 Mich. L. Rev. 867 (1970):

> "It is the inherited wisdom of the American Bar that responsible professional comment and criticism are the principal restraints upon judicial arbitrariness at the highest level and major influences in the continuing development of court-made law. If there is one legal development (or, perhaps more accurately, nondevelopment) found in the pages of the United States reports during the present century which would cause the most credulous observer to doubt the truth of this axiom, it is the continued good health of the doctrine of sovereign immunity. Since the end of the last century, learned members of the legal profession have been continuously attacking the roots and branches of that judicially planted growth, calling into question not only its utility but even the legitimacy of its alleged origins. Oddly enough, this criticism has had a palpable effect upon federal legislators who, according to our agreed-upon notions of legal process, are supposed to be moved not by learned articles but by lobbies and ballot boxes; it has also had its influence, particularly noticeable in very recent years, upon state supreme courts. But if the United States Supreme Court is to be judged by what it has done concerning the doctrine, as opposed to what it has from time to time said, criticism seems to have confirmed the Court in the error of its ways. Not only has there been no judicial elimination of the doctrine of sovereign immunity as it applies to the federal government, but recently the scope of the doctrine has in some important respects been extended beyond what it was in 1952. [Footnotes omitted.]"

[24] Davis, supra, 1970 Supp., 296.

like: a "blatant affront to the basic precepts of justice" -- "incredible ... to all intelligent observers" -- "judicial arbitrariness at the highest level ..."[25] "capricious denial ... of judicial review of administrative action" -- "abdication of judicial responsibility"[26] -- "illogical, confusing and erratic."[27]

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[25] Scalia, supra, 68 Mich. L. Rev. at 869, 867. See also Block, "Suits Against Government Officers," 59 Harv. L. Rev. 1060 (1946): "The consequences [of sovereign immunity cases holding that suits against federal officers are or are not suits against the United States] have not been satisfactory from the standpoint of doctrinal analysis and treatment; and more important, relief has been denied against unconstitutional and unauthorized action on formalistic and technical grounds."

[26] Byse, "Proposed Reforms in Federal 'Non-statutory Judicial Review,'" 75 Harv. L. Rev. 1479, 1491.

[27] Crampton, supra, 68 Mich. L. Rev. at 418. See also Borchard: "Government Liability in Tort," 34 Yale L. J. 1, 2, ("[sovereign immunity] has survived mainly by reason of its antiquity. The facts that the conditions which gave it birth and that the theory of absolutism which kept it alive in England never prevailed in this country and have since been discarded by the most monarchical countries of Europe, have nevertheless been unavailing to secure legislative reconsideration of the propriety and justification of the rule that the state is not legally liable for the torts of its officers."), Wall & Childers, "The Law of Restitution and the Federal Government," 66 Nw. L. Rev. 587, n.1 (1971) ("For no apparent reason this immunity was conferred upon the United States Government and has been very slow to disappear."); Harper & James, 2 Law of Torts, 1609 ("Just how an immunity which had its roots in feudalism and in a political philosophy associated with the divine right of kings was transplanted to the new republic of America remains something of a mystery."), Mikva, "Sovereign Immunity: In a Democracy the Emperor has no Clothes," 1966 U. Ill. L. For. 828 ("Thomas Jefferson said it better than anyone: 'The care of human life and happiness is the first and only legitimate object of good government.' Against such a standard sovereign immunity has been and is a shibboleth that ought to be eliminated from the legal and political vocabulary."); Steadman, "Forgive U.S. its Trespasses?: Land Title Disputes with the Sovereign," 1972 Duke L. J. 15; Jaffe, Judicial Control of Administrative Action, supra, 229, 231; Roady, "Lee, Land, Larson and Malone -- Sovereign Immunity Revisited," 43 Tex. L. Rev. 1062 (1965).

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Indeed, this Court itself has recognized that:

> "[t]he immunity enjoyed by the United States as territorial sovereign is a legal doctrine which has not been favored by the test of time. It has increasingly been found to be in conflict with the growing subjection of governmental action to the moral judgment."
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> -- National City Bank v. Republic of China, 348 U.S. 356, 359-60 (1955).

III. THE SOVEREIGN IMMUNITY ASPECT OF THE APPEAL SHOULD BE DISMISSED SINCE REVERSAL ON THAT GROUND WOULD BE A VAIN AND PRODIGAL ACT WHICH WOULD RESULT ONLY IN THE UNNECESSARY FILING OF DUPLICATIVE LITIGATION TO INEVITABLY REACH THE RESULT ORDERED BELOW.

It should be emphasized that appellees consider that this Court can and should dispose of the sovereign immunity question on a far simpler basis than a full-dress reconsideration of that doctrine, to wit, by dismissing the appeal as so improvident and prodigal as not to be worth the consideration of this Court. At the best of times, sovereign immunity is a "purely technical defense,"[28] which eschews "rational judgments concerning the underlying issue of the right to judicial review."[29] But at least in most cases the sovereign immunity doctrine has the important if unprincipled effect of saving the United States money -- whereas in this case it will work no saving of money, but only an unnecessary expenditure of judicial resources. For SSA admits that Congress has waived sovereign immunity to suits for Social Security benefits under 42 U.S.C. § 405(g) -- but argues that the judgment below rests upon § 405(g) as the

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[28] Shoenberg, 77 F.R.D., 1978 Duke L. J. at 20.

Salfi family has not exhausted the administrative appeal "right" which SSA claims is prerequisite to a § 405(g) action.[30] Thus, even if SSA is right in urging that the judgment below cannot be based upon § 405(g), the result will be that Mrs. Salfi or some other member of her class can simply wait out the utterly futile administrative remedy and then bring a class action under § 405(g) to obtain the exact same relief granted below.[31] Thus, SSA's sovereign immunity argument is little more than a request for an advisory opinion which will save the government nothing while wasting the salaried time of the justices and clerks of this Court and, potentially, of the judge and clerks of the United States District Court.

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[30] As indicated infra, the Salfi family urges that the judgment below can be upheld with reference to § 405(g), notwithstanding any alleged failure to exhaust the administrative remedy.

[31] Cf. Jiminez v. Weinberger, No. 72-6609, 94 S.Ct. 2496 (1974) in which this Court upheld a constitutional class action under § 405(g).

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IV. SECTION 405(g)'S WAIVER OF SOVEREIGN IMMUNITY SHOULD BE HELD TO AUTHORIZE THE JUDGMENT BELOW WITHOUT NECESSITY OF EXHAUSTING AN ADMINISTRATIVE REMEDY WHICH WAS FUTILE AND TO WHICH THE CLASS WAS DENIED ACCESS BY SSA.

In any case, the judgment below may properly be construed to rest upon § 405(g)'s waiver of sovereign immunity, even though a literal reading of that statute might seem to contemplate exhaustion of administrative remedies.[32/] Just last Term this Court held that a similar statute whose literal terms barred any judicial review of veteran's claims was not applicable where the claim involved a constitutional attack upon a statute which the Veterans' Administration had no jurisdiction to invalidate. Johnson v. Robison, 415 U.S. 361 (1974). Consistent with that decision, it has recently been held that exhaustion need not be alleged in a § 405(g) action where the only question at issue is a constitutional attack upon a statute which SSA has no jurisdiction to determine. Diaz v. Weinberger, 361 F.Supp. 1, 4-5 (S.D. Fla. 1973). That holding is given added weight here since SSA has explicitly denied the availability of any administrative remedy to the Salfi class -- something which renders SSA's contention that exhaustion is prerequisite to a § 405(g) action

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32/ Although the Salfi family's pleadings below did not specifically cite § 405(g), the issues they raised were appropriate for resolution under that statute and, under the Federal Rules, they were entitled to relief of any type or under any statute relevant to the issues. Wilwording v. Swenson, 404 U.S. 249 (1971) (prisoners are entitled to maintain action for relief from unlawful conditions of imprisonment under either 42 U.S.C. 1983 or federal habeas corpus). See also Scheuer v. Rhodes, Nos. 72-914 and 72-1318 (Dec. 4, 1973) and Conley v. Gibson, 355 U.S. 41, 45 (1957). That the judgment below does not purport to rest upon § 405(g) is immaterial if this Court determines that it may properly be so justified. See e.g., Brown v. Allen, 344 U.S. 443, 460 ("'In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason.'")

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ironic, if not hypocritical.[33/] Appellees submitted in evidence below an SSA hearing officer's refusal to consider the arguments set forth in the Salfi pleadings on the ground that SSA lacks the authority to declare a statute unconstitutional.[34/] Surely

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33/ SSA concedes, by implication at least, that a hearing in this case would have been meaningless and futile since the local SSA office's rejection was made on the basis of uncontested facts which under the challenged provisions barred the Salfi family from receiving benefits. Jurisdictional Statement, p.10, lines 3-9.

34/ The Administrative Law Judge's decision, "In the case of Lillian Daniels," issued November 14, 1973 (and confirmed by HEW on March 27, 1974), reads as follows, in pertinent part:

> "The real problem in the instant case, however, is that the undersigned judge does not have the authority to question the constitutionality of any section of the Social Security Act. Appointed by the Secretary of the Department of Health, Education and Welfare, the undersigned judge has a mandate to correct any errors, mistakes, or injustices in the cases coming before him in which the factual situation has been misunderstood or the applicable sections of law or regulations have been misinterpreted or incorrectly applied.
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> "A CHALLENGE TO THE CONSTITUTIONALITY of a federal statute must be made in the prescribed manner before the United States District Court. Counsel [for the claimant] has called attention to the fact that the precise legal problem presented by Mrs. Daniels has been raised in an identical situation. In Concetta Salfi v. Weinberger, filed on October 18, 1973, in the Northern District of California, No. C.A. 73-1863, the San Mateo Legal Aid Society, together with the CRLA Cooperative Legal Services Center of San Francisco and the California Rural Legal Assistance of Marysville, have grappled with the question whether the Congressional effort to forestall sham claims is unconstitutional. They have suggested that it would be better if a rebuttable presumption were established that 'a marriage was contracted in expectation of death if the wage earner lived less than nine months thereafter. This would place upon the applicant the burden of coming forward with convincing evidence that the marriage was not entered into in contemplation of death.' [Quoting from appellees' points and authorities submitted to the court below.]
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> "THE UNDERSIGNED JUDGE HAS CONSIDERED WITH COMPASSION the request of a 'waiver' presented by the claimant and her counsel. He has no authority to grant such a waiver -- nor, indeed, does the Appeals Council in Washington or even the Secretary himself. Only a Congressional revision of the Social Security Act can grant the discretion which the claimant now asks to be exercised in her favor." (Emphasis in original.)

this Court should not interpret the Congressional intent to have been to make exhaustion a prerequisite to a § 405(g) action even in cases in which the administrative remedy which Congress provided was refused to the claimant by SSA. Such an interpretation would be particularly inappropriate in view of the fact that, although the courts have created and often extended the doctrine of sovereign immunity, in Congress a "chilly feeling against sovereign immunity began to reflect itself in 1797" and has been the "steady legislative trend" ever since. National City Bank v. Republic of China, 348 U.S. 356, 360 (1955). See also Keifer v. Reconstruction Finance Corp., 306 U.S. 375, 379 (1939).

V. AT LEAST WHERE THE ADMINISTRATIVE REMEDY IS FUTILE OR REFUSED, § 405(g)'S WAIVER OF SOVEREIGN IMMUNITY AS TO SUITS FOR SOCIAL SECURITY BENEFITS ALLOWS SUIT UNDER OTHER APPLICABLE STATUTES SUCH AS 28 U.S.C. 1331 AND 1361 AND THE ADMINISTRATIVE PROCEDURE ACT.

Congress has consented to suits by disappointed applicants for Social Security benefits. SSA contends that that consent is inflexibly limited to situations in which the Congressionally established administrative remedy has been exhausted. In order to determine the rectitude of that contention it is necessary to consider the purpose for which Congress established the administrative remedy and required its exhaustion. Seeing no other possibility, we can only presume that the exhaustion requirement here serves the same purposes it serves elsewhere: To afford the government agency involved an opportunity to review and correct factual errors or misinterpretations of law and to afford the parties and the courts the benefits of the agency's experience and expertise as to the subject matter. See e.g., McKart v. United States, 395 U.S. 185 (1969), Parisi v. Davidson, 405 U.S. 34 (1972) and cases there cited. Though solitary in the vast majority of cases, the exhaustion principle, having been adopted for purely practical reasons, is dispensed with in cases involving the constitutionality of statutes which administrative agencies have no power to adjudicate. Johnson v. Robison, supra, Oestereich v. Selective Service Board, 393 U.S. 233, 242, and cases there cited. See also McKart and Parisi, supra. We can only conclude that Congress, in enacting § 405(g), was fully familiar with these and innumerable previous decisions holding neither Congressionally nor judicially mandated requirements are prerequisite to adjudication of constitutional claims. Thus it follows that the exhaustion requirement of § 405(g) does not bar such review here, either because (as argued in the preceding section) it is not under these circumstances a prerequisite to bringing a § 405(g) action, or because the waiver of sovereign immunity applies to suits for Social Security benefits brought under other applicable statutes.

This result is suggested at once by one of the earliest and one of the latest sovereign immunity cases decided by this Court. Kendall v. United States, 37 U.S. (12 Pet.) 621 (1838) and Honda v. Clark, 386 U.S. 484 (1967). In Kendall a statute authorizing the Solicitor of the Treasury to adjust certain claims was held implicit consent for a suit to require the Postmaster General to honor the settlement -- a suit in which "the real parties to the dispute were, therefore, the [claimants] and the United States." 12 Pet. at 611. In Honda, the Court expanded a waiver of sovereign immunity as to suits brought against the Alien Property Custodian by holding that a very abbreviated statute of limitations was tolled according to traditional equitable principles which it implicitly embraced. The factors relied upon by the Court were similar to those relied upon here: (a) the injustice of a contrary holding in depriving litigants of their proper claims; (b) the clarity of Congress' general

purpose of dispensing with immunity in order to allow litigation of contested claims; (c) the evident purpose of the limitation construed being to enhance administrative efficiency "and not primarily as a shield for the Government";[35] and (d) the existence of a traditional equitable principle of which Congress was doubtless aware in enacting the specific limitation involved.

Nor is there anything revolutionary about suggesting that a waiver of sovereign immunity under a statute limited in subject matter is applicable to a claim limited to the same relief brought under general jurisdictional statutes like 28 U.S.C. §§ 1331, 1361 and the Administrative Procedure Act. Where the alternative is unnecessary duplication of litigation this Court has recognized extraordinary remedies without regard to over-technical jurisdictional quibbling. This is the rationale under which this Court created the doctrine of "pendent jurisdiction" whereby federal courts may entertain state claims of which they would not otherwise have jurisdiction if these are factually identical to federal claims of which they do have jurisdiction. Hurn v. Oursler, 289 U.S. 238, 53 S.Ct. 586, 77 L.Ed. 1148 (1933) and United Mine Workers v. Gibbs, 383 U.S. 822, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966) were creative responses to a situation in which the existence of identical, but jurisdictionally inconsistent, federal and state claims had formerly led to duplicative litigation. Similarly, just this Term this Court found such considerations dispositive in clarifying the authority of federal courts to entertain federal statutory causes of action (of which their jurisdiction is dubious) as pendent to federal constitutional causes of action. Wagons v. Lavine, 415 U.S. 528 (1974), and cases there cited.

Finally it should be noted that only under the theory here advanced (or that of Part IV, supra) can the decision of this Court in Griffin v. Richardson, supra, be explained.

35/ [illegible]

VI. THE DECREE BELOW SHOULD BE UPHELD AS EFFECTUATING SSA'S OWN REGULATIONS WHICH PROVIDE RETROACTIVE BENEFITS WHERE AN APPLICATION WAS ORIGINALLY DENIED DUE TO AGENCY ERROR OR OTHER INADVERTANCE.

An additional reason for upholding the decree below is the provision of SSA's own regulations that persons who are later determined to have erroneously been denied benefits are entitled not only to prospective benefits but to the benefits denied up to four years in the past.[36] Certainly the decree below cannot be barred by sovereign immunity insofar as it simply requires SSA to accord the Salfi class the same treatment which would be accorded to any other Social Security applicants who had erroneously been denied benefits.

VII. THE DECREE BELOW DOES NO MORE THAN EFFECTUATE THE DUE PROCESS CLAUSE UNDER WHICH THE SALFIS AND THOSE SIMILARLY SITUATED WERE ALWAYS ENTITLED TO HAVE THEIR APPLICATIONS CONSIDERED WITHOUT REFERENCE TO THE INVALIDATED CONCLUSIVE PRESUMPTION.

The decree does not require the payment of damages, but the reprocessing of applications which were originally erroneously rejected upon unconstitutional grounds and the payment of benefits to those not otherwise ineligible. In this sense, the decree below is merely an effectuation of the supremacy of the

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36/ 20 C.F.R. § 404.957 reads, in pertinent part:

> "An initial, revised, or reconsidered determination of the Administration or a decision or revised decision of a hearing examiner or of the Appeals Council which is otherwise final under § 404.905, § 404.916, § 404.940, or § 404.951 may be reopened:
> (a) Within 12 months from the date of the notice of the initial determination (see § 404.903), to the party to such determination, or
> (b) After such 12-month period, but within 4 years after the date of the notice of the initial determination, upon a finding of good cause for reopening such determination or decision ..."

constitutional, a recognition that the invalidated provisions were ab initio null and void, a kind of nunc pro tunc order which returns all the actors to their original positions. This rationale is not inconsistent with Edelman v. Jordan, supra, since that case was based upon the Eleventh Amendment which specifically limits the supremacy of the Constitution with regard to federal jurisdiction over suits against states.[37] As sovereign immunity is a purely judicial construct, it is not specially exempt from, and indeed should be entirely subject to, the imperatives of our constitutional system.

VIII. THIS IS A SUIT AGAINST OFFICERS OF THE UNITED STATES FOR WHICH CONGRESS HAS SPECIFICALLY PROVIDED BY LAW AND THUS NOT AN UNCONSENTED SUIT AGAINST THE UNITED STATES ITSELF.

Although the District Court did not rule on them, plaintiffs set out four jurisdictional basis besides 28 U.S.C. § 1331. Those were: (a) the Administrative Procedure Act; (b) 28 U.S.C. § 1361 (mandatory relief against federal officers); (c) 42 U.S.C. § 1985(2) (civil rights conspiracy statute) and its jurisdictional counterpart, 28 U.S.C. § 1343(1); (d) a cause of action springing from the Fifth Amendment itself without necessity of Congressional authorization as per Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) and cases there cited. While there are as yet no decisions on the point, appellees would contend that sovereign immunity is not a bar to the bringing of a case like the present under § 1985 or under the Bivens constitutional cause of action.[39]

37/ Footnote 19 in Edelman specifically disclaims any holding as to whether a state court could or should provide the relief barred by the Eleventh Amendment on the grounds that that Amendment has no effect upon the state judiciary and that the question would be purely one of sovereign immunity with which Edelman was not concerned.

The Administrative Procedure Act authorizes such broad review of administrative action that it has frequently been held to constitute a waiver of sovereign immunity. Kingsbrook Jewish Medical Center v. Richardson, 486 F.2d 663, 668-669 (2 Cir. 1973) (sovereign immunity does not bar suit to require HEW to correct admittedly inadequate reimbursement for Medi-Cal services performed by contracting agency), Constructores Civiles de Centroamerica v. Hannah, 459 F.2d 1183, 1191 (D.C. Cir. 1972) (sovereign immunity does not bar suit for "mandatory injunction and declaratory judgment" to require A.I.D. to consent to the letting of a contract to the plaintiff company), Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 873-874 (D.C. Cir. 1970) (sovereign immunity does not bar action for declaratory relief of plaintiff's right to contract award where, allegedly, another bidder was improperly accepted), Kletscha v. Driver, 411 F.2d 436, 445 (2 Cir. 1969) (sovereign immunity does not bar suit by government employee for injunctive and declaratory relief from allegedly illegal disciplinary transfer), Mulry v. Driver, 366 F.2d 544, 547 (9 Cir. 1966) (sovereign immunity does not bar suit by government employees to invalidate regulation which prevents them from engaging in after-hours employment), Estrada v. Ahrens, 296 F.2d 690, 695 (5 Cir.

38/ Since Bivens involved federal officers and a constitutional provision directed to the federal government, it is clear that Bivens-type litigation may be brought against federal officers. Since § 1985, unlike its companion, 42 U.S.C. 1983, does not contain the limiting words, "color of state law," it is equally applicable to federal officers. City of Kenosha v. Bruce, 412 U.S. 507 (1973), holds (by implication) that § 1985 as well as § 1983 actions may not be maintained against state agencies. But the basis of this holding is the debate on the "Sherman Amendment" which showed Congressional dubiety as to whether federal courts could entertain suits against state agencies. Obviously, Congress could have entertained no doubt that it could authorize federal courts to entertain causes of action against federal officers or agencies.

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1961) (sovereign immunity does not bar action by alien to require his admission into the United States). Per contra: Littell v. Morton, 445 F.2d 1207, 1212-1214 (4 Cir. 1971) and cases there cited.

Congress enacted 28 U.S.C. § 1361 for the precise purpose of providing a mandamus-type cause of action against federal officers. In doing so, it implicitly consented to litigation like the present. This is particularly true since Congress must have been aware of the numerous decisions by this Court holding sovereign immunity no bar to mandamus actions to force federal officers to pay pension, retirement and/or other benefits comparable to Social Security. See e.g., Miguel v. McCarl, 291 U.S. 442, 455. See also Roberts v. United States ex rel Valentine, 176 U.S. 221 (1900). Just last Term this Court held in a case brought under § 1361 that a class (which it redefined) could maintain an action to mandate re-examination of applications for federal Indian welfare benefits which had previously been denied due to an invalid administrative regulation. Morton v. Ruiz, 415 U.S. 199 (1974). (The judgment must rest either upon the view that sovereign immunity was waived by § 1361, or that it was never involved because the officers sued were acting in excess of their authority -- see Part I of this section, supra.)

IX. A DECREE DOES NOT OPERATE AGAINST THE TREASURY WITHIN THE MEANING OF LARSON FOOTNOTE 11 WHERE THE FUNDS NECESSARY FOR THE IMPLEMENTATION HAVE ALREADY BEEN APPROPRIATED BY CONGRESS AND ONLY THE ENJOINED UNCONSTITUTIONAL OFFICIAL ACTION PREVENTS THEIR DISBURSAL.

It has been held that Larson Footnote 11 is inapplicable where the fund which is subject to the suit has already been appropriated by Congress for the purpose of being so disbursed. Commonwealth of Pennsylvania v. Lynn, 362 F.Supp. 1363, 1368-1369 (D. D.C. 1973), Local 2677, AFGE v. Phillips, 358 F.Supp. 60, 68-69 (D. D.C. 1973). See e.g., State Highway Commission v. Volpe, 479 F.2d 1099, 1123 (8 Cir. 1973 ("notwithstanding, we do not consider the court's decree in the instant case as being affirmative in nature [within the prohibition of the Larson footnote]. It requires only that the defendant officers cease unauthorized action. Cf. Rockbridge v. Lincoln, 449 F.2d 567, 573 (9 Cir. 1971). The resultant release of funds is only to the extent that Congress has already authorized them to be appropriated and expended.")

Similarly, the judgment below cannot be said to operate against the Treasury because Social Security benefits are paid from a trust fund derived from contributions of employers and wage earners rather than a regular appropriation of Treasury funds. And, again, the decree does not mandate the payment of benefits but only re-examination of eligibility without application of the invalidated conclusive presumption.

CLASS ACTION

As noted in the Statement of Facts, SSA stipulated to the Rule 23(b)(2) allegations of the Complaint and to having all issues of the case decided in one combined hearing. Presumably it did so in hopes of obtaining a decree in its favor which would bind the class. Only after the matter was decided adversely did SSA make an objection to the class action procedure in its Motion for Rehearing. That objection, which is pressed here, goes not to the appropriateness of the class action, the definition of the class, or the representativeness of the Salfi family, but only to

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the fact that the order required SSA to notify all persons who had previously been denied benefits on the basis of the invalidated provisions that they could renew their applications. SSA argues that, since retroactive class damages were awarded, this must have been an action under Rule 23(b)(3) in which the notice ordered must be paid for by the plaintiffs according to Eisen v. Carlysle & Jacqueline, No. 73-203 (May 28, 1974). To briefly correct this bizarre combination of misconstructions:

First, the notice required does not at all relate to the pre-judgment notice requirements of Rule 23(c)(2), but rather is the kind of post-judgment notice decreed where it is necessary to correct previous widespread wrongful or erroneous conduct of the defendant.[39/] The necessity here arises out of the fact that SSA had previously denied benefits on the basis of the invalidated provisions to thousands of applicants across the country. These people would never have the opportunity to receive either prospective or retrospective benefits unless notified that they should reapply. Thus this notice cannot serve the same purpose of that contemplated by Rule 23(c)(2) which is to notify members of a (b)(3) class of the pendency of the lawsuit so that they may exercise their opportunity to opt out. Such pre-judgment notice, the cost of which Eisen requires plaintiffs to bear, has no application to a (b)(2) lawsuit like the present since class members may not opt out of a (b)(2) lawsuit. But even if they could, the post-judgment notice which the court below ordered would clearly not be an Eisen-type notice since it is a little late to try to opt out of the class after final judgment has been entered. Second, had the notice been a (c)(2) notice like that in Eisen, the order that SSA provide it would still have been proper. Nothing in Eisen purports to change the general rule that the cost of notice in a class action -- like all other costs -- is ultimately borne by the losing party.[40/] Since at the time notice was ordered SSA had already been determined the losing party, it was properly required to pay the expenses of notification. Moreover, notification by SSA was the only practicable method since the membership of the class can be determined only by examining Social Security files and computers. Under the confidentiality requirements of the Social Security Act (42 U.S.C. § 1306), only SSA employees can make such an examination and they cannot divulge the results thereof.

Third, SSA to the contrary notwithstanding, this was a Rule 23(b)(2), rather than a (b)(3) lawsuit since the prayer for retroactive damages was only terciary in importance to the prayer for declaration of the unconstitutionality of the challenged provisions and equitable relief against their enforcement.[41/] Nothing in Eisen purports to apply (b)(3) notice requirements to (b)(2) actions -- which the opinion carefully differentiates, describing

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39/ See e.g., Reed v. Arlington Hotel Co., Inc., 476 F.2d 721, 725 (8 Cir. 1973) (notice required of correction of previous discriminatory hiring policies), United States v. Jefferson County Board of Education, 380 F.2d 385, 391 (5 Cir. 1967) (notification of acceptance from previous segregated school police required to be sent to every Black family), Bivell v. Savannah-Chatham Board of Education, 348 F.2d 55, 65 (5 Cir. 1965) (same), Miller v. School District No. 2, 256 F.Supp. 370, 374 (D. S.C. 1966) (same).

40/ See e.g., Katz v. Carte Blanche Corp., 53 F.R.D. 539, 546 (W.D. Penn. 1971) ("The cost of notice, of course, will be recoverable by plaintiffs if the action is prosecuted successfully."), Dudley v. Southeastern Factor and Finance Co., 57 F.R.D. 177, 180 (N.D. Ga. 1972) and cases there cited.

41/ It is self-evident that the relief sought was predominantly injunctive and declaratory since its primary effect was to invalidate federal legislation which bars the receipt of benefits for years in the future. The fact that some members of the class might also qualify for past due benefits is incidental. Thus, for instance, according to SSA's figures, Mrs. Salfi would be entitled to only $2,461.20 in back benefits, but (at her present life expectancy of 28 years) $59,068.80 in future benefits. See pp. 7-8 of Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction setting out the retroactive benefit period as 14 months, the amount of benefits per month at $303.40 minus $187.60 which the Salfi family receives in Social Security Disability benefits.

as "broadly apt for injunctive or declaratory relief. [Emphasis added.]" Id., n. 2, adopting the language of the Advisory Committee's note, "Proposed Rules of Civil Procedure," 39 F.R.D. at 98, 102 (1966).

In a footnote, SSA mentions the dictum of the Court of Appeals in Eisen II[42] (which was not reviewed by this Court) suggesting that individual notice and the right to opt out is required by due process even in (b)(2) actions. If correct, this suggestion would require the invalidation of Rule 23 as presently constituted since its notice and opting out provisions apply only in (b)(3) actions.[43] As a practical matter a requirement of individual notice in (b)(2) actions would end class race and sex discrimination litigation under Title VII of the Civil Rights Act of 1964, class school desegregation litigation and class challenges to the constitutionality of federal, state and local legislation or administrative practices, to mention but a few of the areas hardest hit. Perhaps for that reason the Eisen II dictum has been ignored by innumerable subsequent decisions of this Court,[44] limited to its facts in an opinion of two judges of the Eisen circuit[45] and repudiated or ignored in several other

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42/ 391 F.2d 555, 564-565, cited at Jurisdictional Statement, p.13, n. 9.

43/ Although nothing in Rule 23 excludes notice to a (b)(2) class, the Advisory Committee's note makes it clear that such notice is not required. Thus, at 39 F.R.D. 105 the note states that (b)(2) judgments are binding on the entire class, but (b)(3) judgments are binding only upon those class members who have received individual notice. And at 39 F.R.D. 102, the note states that a (b)(2) action is "usually one whose members are incapable of specific enumeration." Obviously if the class membership cannot be enumerated, it cannot be identified for notification.

44/ E.g., Norton v. Ruiz, supra, in which the Court remanded with specific instructions as to redefining the class, but neglected to raise any question of a notice requirement and Griffin v. Board of Supervisors, supra, and Lee v. Macon, supra, each of which involved class actions identical to the present case.

45/ Lee v. Macon County Board of Education, 300 F.Supp. 720, 722, n.3 (M.D. Ala. 1969).

Court of Appeals opinions.[46]

To determine the rectitude of the Eisen II dictum we must weigh the interests involved in receiving notice both generally and in the specific circumstances of each individual case since this is the method by which due process questions are resolved.[47] The relevant interest here is that of the individual member of the class in receiving notice so that he may opt out and thus not be bound by the ensuing judgment.[48] But, on analysis, it becomes apparent that, at least in a case like the present, (b)(2) class members are no differently situated if they receive notice and the opportunity to opt out than if they are bound by the class judgment without ever having the opportunity to opt out. Obviously if the class action is successful, the Salfi class member has no interest in opting out. Thus his interest in notice and opting out arises only if he fears that the action will be lost and desires not to be bound by that loss. But even if not bound,

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46/ Bing v. Roadway Express, Inc., 485 F.2d 441, 447-448 (5 Cir. 1973), Hammond v. Powell, 462 F.2d 1053, 1055 (4 Cir. 1972), Yaffe v. Powers, 454 F.2d 1362, 1366 (1 Cir. 1972), Arkansas Education Association v. Board of Education, 446 F.2d 763 (8 Cir. 1971), Robinson v. Lorillard Corp., 444 F.2d 791 (4 Cir. 1971).

47/ See e.g., Morrissey v. Brewer, 408 U.S. 471, 481 (1972), United States v. Caltex, Inc., 344 U.S. 149 (1953).

48/ Although the analysis here is limited to the interest of the class member, two other interested parties might also be identified: the Federal Government (i.e., the Federal Courts), and the party adverse to the class. Since the United States has enacted Rule 23 as it stands, its interest is presumably in encouraging non-notice class actions as the most efficient means of disposing of what might otherwise be a multitude of small individual cases. The hypothetical adverse party, on the other hand, has no interest in the notice question either way, but only in having it clearly resolved as it is now in present Rule 23. This is because his concern is simply that the class be bound by an adverse judgment and he therefore should be willing to accept any procedure (i.e., notice or not) which accomplished this. Since in all events the adverse party, unlike the absent class member, will have his day in court, whatever his interest in the notice question may be it does not rise to a level of due process significance.

had to question the class action procedure and to claim that it is not bound to provide class relief. As the Court of Appeals for the Fifth Circuit held in a virtually identical situation, SEA acquiesced in an implicit (b)(2) action, leading the court to believe (in this case correctly) that there was no dispute as to the rectitude of the class action. Bing v. Roadway Express, Inc., supra. Although the factual situation was very different, the language of Mr. Justice Douglas, speaking for the Court in Johnson v. United States, 318 U.S. 198, 201 (1943), seems entirely appropriate: "The Court only followed the course which [the defendant] himself helped to chart and in which he acquiesced until the case was argued on appeal."

For the foregoing reasons, appellees urge that the judgment below be affirmed and/or that it be affirmed on the constitutional question, and the class action and sovereign immunity issues be dismissed.

DATED: September 25, 1974.

Respectfully submitted,

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42 U.S.C. 416(e) provides:

(e) Child.

The term "child" means (1) the child or legally adopted child of an individual, (2) a stepchild who has been such stepchild for not less than one year immediately preceding the day on which application for child's insurance benefits is filed or (if the insured individual is deceased) not less than nine months immediately preceding the day on which such individual died, and (3) a person who is the grandchild or stepgrandchild of an individual or his spouse, but only if (A) there was no natural or adoptive parent (other than such a parent who was under a disability, as defined in section 423(d) of this title) or such person living at the time (i) such individual became entitled to old-age insurance benefits or disability insurance benefits or died, or (ii) if such individual had a period of disability which continued until such individual became entitled to old-age insurance benefits or disability insurance benefits, or died, at the time such period of disability began, or (B) such person was legally adopted after the death of such individual by such individual's surviving spouse in an adoption that was decreed by a court of competent jurisdiction within the United States and such person's natural or adopting parent or stepparent was not living in such individual's household and making regular contributions toward such person's support at the time such individual died. For purposes of clause (1), a person shall be deemed, as of the date of death of an individual, to be the legally adopted child of such individual if such person was at the time of such individual's death living in such individual's household and was legally adopted by such individual's surviving spouse after such individual's death but only if (A) proceedings for the adoption of the child had been instituted by such individual before his death, or (B) such child was adopted by such individual's sur-

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viving spouse before the end of two years after (i) the day on which such individual died or (ii) August 28, 1958; except that this sentence shall not apply if at the time of such individual's death such person was receiving regular contributions toward his support from someone other than such individual or his spouse, or from any public or private welfare organization which furnishes services or assistance for children. For purposes of clause (2), a person who is not the stepchild of an individual shall be deemed the stepchild of such individual if such individual was not the mother or adopting mother or the father or adopting father of such person and such individual and the mother or adopting mother, or the father or adopting father, as the case may be, of such person went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of subsection (h)(1)(B) of this section, would have been a valid marriage.

42 U.S.C. 416(k) (Supp. II) provides:

> (k) Waiver of nine-month retirement for widow, stepchild, or widower in case of accidental death or in case of serviceman dying in line of duty, or in case of remarriage to the same individual.
>
> The requirement in clause (5) of subsection (c) of this section or clause (5) of subsection (g) of this section that the surviving spouse of an individual have been married to such individual for a period of not less than nine months immediately prior to the day on which such individual died in order to qualify as such individual's widow or widower, and the requirement in subsection (e) of this section that the stepchild of a deceased individual have been such stepchild for not less than nine months immediately preceding the day on which such individual died in order to qualify as such individual's child, shall be deemed to be satisfied, where such individual dies within the applicable nine-month period, if—
>
> (1) his death—
>
> (A) is accidental, or
>
> (B) occurs in line of duty while he is a member of a uniformed service serving on active duty (as defined in section 410(*l*)(2) of this title), unless the Secretary determines that at the time of the marriage involved the individual could not have reasonably been expected to live for nine months, or
>
> (2)(A) the widow or widower of such individual had been previously married to such individual and subsequently divorced and such requirement would have been satisfied at the time of such divorce if such previous marriage had been terminated by the death of such individual at such time instead of by divorce, or
>
> (B) the stepchild of such individual had been the stepchild of such individual during a previous marriage of such stepchild's parent to such individual which ended in divorce and such requirement would have been satisfied at the time of such divorce if such previous marriage had been terminated by the death of such individual at such time instead of by divorce;
>
> except that paragraph (2) of this subsection shall not apply if the Secretary determines that at the time of the marriage involved the individual could not have reasonably been expected to live for nine months. For purposes of paragraph (1)(A) of this subsection, the death of an individual is accidental if he receives bodily injuries solely through violent, external, and accidental means and, as a direct result of the bodily injuries and independently of all other causes, loses his life not later than three months after the day on which he receives such bodily injuries.

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AFFIDAVIT OF SERVICE BY MAIL

I, Jeanne Pritchard, certify that I am a citizen of the United States, over the age of 18 years, and not a party to the within action, nor an attorney or record. My place of employment and business address is 1212 Market Street, San Francisco, California 94102.

I served a true copy of the attached MOTION TO AFFIRM AND/OR DISMISS on the Appellant herein by placing a true copy thereof in an envelope addressed as follows:

Robert H. Bork, Solicitor General
Carla A. Hills, Assistant Attorney General
William L. Patton, Assistant to the Solicitor General
William Kanter, Esq.
John K. Villa, Esq.
Department of Justice
Washington, D.C. 20530

Said service is in compliance with paragraphs 1 and 3 of the Supreme Court Rule 23. All parties required to be served have been served.

DATED: September 26, 1974.

JEANNE PRITCHARD

Sworn and subscribed to
before me, a Notary Public,
this ___ day of September,
1974.

NOTARY PUBLIC

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